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15 UNITED STATES BANKRUPTCY COURT

16 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

17 In re

18 THE ROMAN CATHOLIC ARCHBISHOP
OF SAN FRANCISCO,

19 Debtor and
20 Debtor in Possession.

Case No. 23-30564

Chapter 11

**DEBTOR'S REQUEST FOR HEARING
AND OPPOSITION TO *EX PARTE*
APPLICATION OF CERTAIN INSURERS
FOR ENTRY OF AN ORDER PURSUANT
TO BANKRUPTCY RULE 2004
COMPELLING PRODUCTION OF
DOCUMENTS**

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CASE No. 23-30564

1 The Roman Catholic Archbishop of San Francisco (“RCASF” or “Debtor”), the debtor and
2 debtor in possession in the above-captioned chapter 11 case (the “Bankruptcy Case”), hereby
3 submits its opposition (“Opposition”) to and respectfully requests a status conference hearing to
4 discuss the *Ex Parte Application of the Certain Insurers for Entry of an Order Pursuant to*
5 *Bankruptcy Rule 2004 Compelling Production of Documents* [ECF No. 571] (the “Application”),
6 filed on April 2, 2024, by the Century Indemnity Company, as successor to CCI Insurance Company
7 and Insurance Company of North America, Pacific Indemnity Company (“Century”), Westchester
8 Fire Insurance Company as successor in interest to Industrial Underwriters Insurance Company for
9 policies JU835-8355 and JU895-0964 (“Westchester”), and Continental Insurance Company
10 (“Continental,” and together with Century, Westchester, and any other parties properly joined in the
11 Application, the “Insurers”). In support of this Opposition, the Debtor hereby states as follows:

12 I. INTRODUCTION

13 At the outset of this Bankruptcy Case, the Debtor expressed its readiness and willingness to
14 engage with all parties in interest to work toward achieving the best result possible in the shortest,
15 reasonable amount of time. The Debtor and its professionals have maintained, and again reiterate,
16 this commitment to achieving the most reasonably expedient optimal outcome. The Debtor must,
17 however, oppose the Application in order to correct certain misstatements of fact asserted therein,
18 and because the Insurers’ document requests far exceed not only the Committee’s discovery requests
19 but also the limits of permissible discovery under Rule 2004. The Debtor further opposes the
20 Application because the Insurers’ proposed form of order seeks to compel the Debtor to produce
21 documents, despite the fact that the Insurers have neither requested such documents from the Debtor
22 directly as part of the Bankruptcy Case, nor made any meaningful effort to confer with the Debtor
23 with respect to the production of such documents.

24 Critically, none of the Insurers themselves have executed the Agreement to be Bound by the
25 Protective Order, and only one of the Insurers’ counsel, Simpson Thacher, have done so. The
26 documents already produced by the Debtor to the Committee, and beyond that, the broad swaths of
27 documents now sought by the Insurers on top of the current productions, contain highly sensitive
28

1 and confidential information. The Debtor will not and cannot produce the documents to the Insurers
2 until each signs the Agreement to be Bound.

3 Moreover, at least some of the Insurers, such as LMI, have represented that they will *not*
4 sign the Agreement to be Bound but want the Court to order production of these highly confidential
5 documents nevertheless. *See, e.g.*, ECF No. 577 at 3. In early February, the Debtor was approached
6 with a request by certain Insurers to modify the Protective Order to clarify the one signature
7 requirement on the Agreement to be Bound for law firms and Insurers. Since then, the Debtor has
8 been working with the Committee and the Insurers on a stipulation to do so. The Debtor believes
9 that stipulation is finalized and ready for signature, although it has taken the Insurers an exorbitant
10 amount of time to get it done. Only recently did LMI insist on a substantive modification to the
11 Protective Order, which the Debtor has rejected.¹

12 The Debtor is likewise ready and willing to provide the Insurers with subsets of the document
13 production it has provided to the Committee, which is all the Insurers purport (albeit misleadingly)
14 to seek once the Insurers are subject to a protective order. But instead of engaging in any meaningful
15 way with the Debtor, as they should have, the Insurers have skipped straight to the courthouse in
16 attempt to exempt themselves from the confidentiality obligations accepted by all other discovery
17 stakeholders. Their Application is thus premature and improper.

18 II. BACKGROUND

19 A. Procedural History.

20 On November 7, 2023 the Committee filed an *ex parte* application [ECF No. 292] (the
21 “Committee 2004 Application”) for discovery under Rule 2004, which was granted pursuant to the
22 terms of the Court’s order [ECF No. 383] (the “Committee 2004 Order”) entered on December 19,
23 2023.

24
25 ¹ The issue involves paragraph 27 of the Protective Order requiring Receiving Parties to return or
26 destroy Designated Materials upon the entry of a final decree in the Bankruptcy Case, except as
27 otherwise ordered by the Court. LMI would like to add an elaborate process for Receiving Parties
28 to retain Designated Materials to meet the requirements of its auditors, accountants, regulatory
agencies, or reinsurers. The Debtor’s position is the “except as otherwise ordered by the Court”
provision allows LMI to seek such relief if and when it is needed at the end of the case and that it
would not be prudent to agree to a blanket exception now for circumstances that are unknown at
this time.

1 On December 18, 2023, the Court entered the stipulated protective order [ECF No. 374] (the
2 “Protective Order”) negotiated between the Debtor and the Committee, which governs discovery in
3 the Bankruptcy Case. The Protective Order includes an Acknowledgment and Agreement to be
4 Bound form (the “Agreement to be Bound”) for additional parties to join the Protective Order.

5 On January 9, 2024, counsel for the Committee served on the Debtor the Committee’s
6 *Subpoena [Duces Tecum] for Rule 2004 Examination* and 121 requests for production attached
7 thereto pursuant to the Committee 2004 Order (the “Committee’s Subpoena”). Based on prior
8 conferrals with the Debtor, the Committee 2004 Subpoena had been revised and slightly narrowed
9 down from the originally proposed 138 requests for production contained in the Committee 2004
10 Application.

11 On October 27, 2023, Century and Westchester filed a motion for relief from the automatic
12 stay to permit a coverage action they had filed in state court less than 30 days prior to the petition
13 date. ECF No. 251. That motion was resolved by a stipulation providing for the withdrawal of the
14 motion for relief from stay, agreement not to re-file the motion without providing at least 45 days
15 notice to the Debtor, and the Debtor agreeing not to remove the coverage action without providing
16 at least 45 days to the moving parties (in addition to all parties reserving all rights). ECF No. 453.

17 On April 2, 2024, without conferring with the Debtor, Century, Westchester, and Continental
18 filed the Application. ECF No. 571. The Application states that Century, Westchester, and
19 Continental “previously asked the Debtor to provide the [requested documents], but the Debtors
20 have declined to do so,” *id.* at 5, but it does not set forth any suggestion that those requests were
21 made as part of the Bankruptcy Case or even post- and not pre-petition.

22 On April 4, 2024, Chicago Insurance Company, Fireman’s Fund Insurance Company,
23 Westport Insurance Corporation f/k/a Employers Reinsurance Corporation, and Appalachian
24 Insurance Company joined in the Application. ECF No. 572. And, on April 5, 2024, First State
25 Insurance Company and Certain Underwriters at Lloyd’s London and Certain London Market
26 Companies (“LMI”) filed separate joinders to the Application. Notably, LMI’s joinder focuses on
27 LMI’s *pre-petition* efforts to obtain certain of the documents now requested in the Application.
28 Equally notable is the absence of any suggestion that LMI or any other of the insurers had

1 meaningfully conferred with the Debtor's counsel within the context of the Bankruptcy Case
2 regarding the document requests or any desired revisions to the Protective Order to facilitate the
3 Debtor's production of documents to them.

4 **B. The Insurers Failed to Meaningfully Confer Prior to Filing the Application.**

5 Concurrent with the Debtor and Committee negotiating a protective order and an order on
6 the Committee's 2004 Application, the Debtor and some of the Insurers (and other of the Debtor's
7 insurers) were conferring regarding the stay and potential removal of the state court coverage action.
8 As part of those conferrals, counsel for the Century and Westchester Insurers raised the issue of
9 Century's and Westchester's desire to receive the Debtor's document productions to the Committee
10 in the context of negotiating a stipulation regarding the state court coverage action. In response, on
11 January 26, 2024, counsel for the Debtor acknowledged the Insurers' desire to partake in the
12 Committee's discovery but explained that the Debtor was still conferring with the Committee
13 regarding the scope of the Debtor's document production, and as such, the Debtor could not at that
14 time commit to reproduce to the Insurers *every* document that would be produced to the Debtors.
15 The Debtor's counsel also asked that in the meantime, the Insurers "sign the protective order and
16 send it back. [The Debtor] can't produce anything until we get that. No one has sent in a signed
17 protective order." While Simpson Thacher, as counsel for Century and Westchester, subsequently
18 provided an executed Agreement to be Bound on behalf of Simpson Thacher on January 31, 2024,
19 none of the Insurers have executed the Agreement to be Bound to date. Nor have any of the Insurers
20 meaningfully conferred with the Debtor since that time regarding potential revisions to the
21 Protective Order and to even reiterate the Insurers requests for copies of the Debtor's document
22 production.

23 In contrast, after receiving the Committee Subpoena, the Debtor and the Committee have
24 worked cooperatively and conferred regularly concerning the Debtor's objections to the document
25 requests, the categories of documents that are of priority to the Committee, initial compromises and
26 limitations on the document requests, such as agreeing generally to a 10-year lookback period for
27 most requests, and on the Debtor's process for responding to the Committee's "abuse claims"
28 requests.

1 Pursuant to the Protective Order, Committee 2004 Order, the Committee’s Subpoena, and
2 the Debtor’s and Committee’s conferrals, the Debtor has made nine document productions to date,
3 consisting of more than 63,000 pages of documents, including hundreds if not thousands of highly
4 confidential financial data files and reports. The Debtor remains willing and ready to provide the
5 subsets of this production to the Insurers and has been awaiting receipt of executed Agreements to
6 be Bound so that the documents can be provided to the Insurers. And the Debtor is optimistic that
7 this issue can be mutually resolved in a timely manner without the Court’s intervention if the
8 Insurers’ counsel engages and confers with the Debtor’s counsel. The Insurers’ Application is thus
9 premature.

10 III. THE DEBTOR’S OPPOSITION

11 A. The Insurers’ Requested Discovery Extends Beyond the Committee’s Discovery.

12 In their Application, the Insurers assert that they “simply request that the Debtor and/or
13 Committee provide a *subset* of” the documents and information the Debtor is producing to the
14 Committee. (App. at 2 (emphasis added)). But that is not true. The Insurers’ proposed requests for
15 production, on their face, extend well beyond seeking a reproduction of documents the Debtor has
16 already produced to the Committee in this case.

- 17 • The Insurers first request seeks “*all*” documents and communications “relating to”
18 the Debtor’s insurance coverage and policies dating back to 1950, “including”—but
19 not by any means limited to—documents responsive to the Committee’s request nos.
20 94-107.
- 21 • The Insurers’ second request similarly seeks “*all*” documents and communications
22 “relating to” abuse claims, “including”—but not limited to—the documents already
23 produced in response to the Committee’s request nos. 108-138.
- 24 • In their third request, the Insurers also seek “*all*” documents and communications
25 with the Committee regarding the “scope of the Debtor’s search, collection, and
26 production . . .” in response to request nos. 94-138.
- 27 • The Insurers’ fourth request is completely untethered from the Committee’s requests,
28 as it seeks “*all*” documents and communications, “including written discovery

1 responses, jury interrogatory and verdict forms, trial transcripts, deposition
2 transcripts, pre-trial substantive motions, and transcripts of pre-trial hearings” for
3 any litigation involved Fr. Joseph T. Pritchard.

4 As an initial matter, and reflective of the Insurers’ failure to adequately confer with the
5 Debtor before filing the Application, the Insurers’ first three requests reference the Committee’s
6 *draft*, never served subpoena. Following the Court’s order granting the Committee’s requested Rule
7 2004 discovery, the Committee served a revised subpoena containing 121, not 138, requests. As
8 such, the Insurers’ first three requests are flawed and in that sense, nonsensical and unanswerable.

9 Second, by their plain terms, each of the Insurers’ first two requests entirely subsume the
10 referenced (but never served) 43 Committee requests. These requests make the Debtor’s current
11 production a subset of the information sought by the Insurers and not *vice versa*, as the Insurers
12 would have the Court believe.

13 Third, the Insurers’ requests ignore not only the final requests actually served on the Debtor
14 by the Committee but also the initial compromises that the Debtor and Committee have reached
15 (while respectively reserving all rights) regarding the Committee’s “abuse claims” requests.
16 Pursuant thereto, the Debtor’s initial production efforts included reproducing the documents
17 produced in JCCP No. 5108 to the Committee. And, presently, the Debtor and Committee are
18 reviewing the proofs of claim filed in this case, and secondarily, in any pending lawsuits against the
19 Debtor or its affiliates that have no corresponding proofs of claim, to identify whether there are
20 accused individuals for whom the Debtor possesses a personnel file that has not been produced, with
21 such documents to comprise the second stage of the Debtor’s production in response to the
22 Committee’s “abuse claim” requests. The Insurers’ second and fourth requests therefore extend far
23 beyond the information the Debtor is providing to the Committee as part of ongoing discovery.

24 Finally, given the excessive and far-ranging scope of the Insurers’ requests, the requested
25 discovery is untethered from the parameters of discovery sanctioned by Rule 2004 and other
26 applicable rules. The Debtors object to the discovery as not relevant to the Insurers’ claims in the
27 Bankruptcy Case, unduly burdensome on the Debtor given the lack of apparent relevance of the
28 information sought, temporally overbroad under any possible applicable law in that it seeks

documents and information within a 75-year time period, and duplicative of the depositions the Committee will take of the Debtor's representative(s) regarding their discovery search efforts.

B. The Balance of the Insurers' Requested Discovery Exceeds the Limits of Rule 2004.

"The object of the [Rule 2004] examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved." *Cameron v. United States*, 231 U.S. 710, 717 (1914); *see also In re Downs*, No. 8:16-BK-12589-SC, 2021 WL 4823508, at *3 (Bankr. C.D. Cal. Oct. 13, 2021) (explaining the purpose of Rule 2004 is "to discover assets, liabilities, improper transfers, and other important information related to the administration of a bankruptcy estate"). While discovery under Rule 2004 is unquestionably broad, it is not unlimited. Indeed, the Ninth Circuit Bankruptcy Appellate Panel has cautioned that Rule 2004 "is not without limits" and cannot "stray into matters which are not relevant to the basic inquiry." *In re Mastro*, 585 B.R. 587, 597 (B.A.P. 9th Cir. 2018); *see also In re Farris-Ellison*, No. 2:11-bk-33861-RK, 2015 WL 5306600, at *3 (Bankr. C.D. Cal. Sep. 10, 2015) ("[A] Rule 2004 examination must be both 'relevant and reasonable.'"). Rule 2004 requires a court to "balance the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination." *In re Art & Architecture Books of the 21st Century*, No. 2:13-bk-14135-RK, 2019 WL 9243053, at *6 (Bankr. C.D. Cal. Dec. 6, 2019) (quoting *In re SunEdison, Inc.*, 562 B.R. at 250). "That documents meet the requirement of relevance does not alone demonstrate that there is good cause for requiring their production." *Id.* Rather, Rule 2004 examinations must be both "relevant and reasonable." *Id.* (citations omitted). The parties seeking Rule 2004 discovery bear "the burden to show good cause for the examination" they seek, and determining whether to grant relief "lies within the sound discretion of the Bankruptcy Court." *In re SunEdison, Inc.*, 562 B.R. at 249.

Here, the Insurers have failed to demonstrate good cause. While the Debtor does not object to providing the Insurers with copies of documents and information the Debtor has produced to the Committee, the Debtor objects to the Insurers' attempt to obtain sweeping, overbroad, and unduly burdensome discovery for almost 75 years' worth of documents. The documents sought by the Insurers have no apparent relevance, and the Insurers have not explained why they need them.

1 Though the Insurers claim to merely be seeking a “subset” of the Debtor’s document production to
2 the Committee, they are actually asking the Court to order the Debtor to engage in overbroad and
3 unduly burdensome discovery for almost 75 years’ worth of documents.

4 **C. The Insurers’ Proposed Form of Order Is Improper for a Rule 2004 Application.**

5 The Insurers have not previously requested these documents from the Debtor, either formally
6 or informally. Despite making these requests for the first time in the Application, the Insurers’ seek
7 entry of a proposed form of order which provides that:

8 2. The Insurers are authorized to issue a subpoena directed
9 to the Debtor (the “**Debtor Subpoena**”) requiring the Debtor to produce
10 documents responsive to the Debtor Document Requests.

11 3. the Debtor shall furnish all documents the Insurers
12 request in the Debtor Subpoena and shall produce the same to the
13 Insurers’ counsel within fourteen (14) days of service of the Debtor
14 Subpoena upon entry of this Order.”

15 (App. at Ex. 3, ¶¶ 2-3).

16 At most, an application under Rule 2004 can seek authority to serve a subpoena that may
17 include document requests, instructions, and a deadline to produce. Yet the Insurer’s proposed order
18 would simultaneously authorize the Insurers to issue the requested subpoena, and require the Debtor
19 to comply with the subpoena. The Application therefore effectively operates as a motion to compel
20 and is improper under Rule 2004. If the Court grants the Application, the form of order ultimately
21 entered must preserve the Debtor’s right to object to any subpoena issued by the Insurers.

22 **D. The Application Should Not Be Granted Without Notice and a Hearing.**

23 Bankruptcy Rule 2004 authorizes the “examination of any entity.” Fed. R. Bankr.
24 P. 2004(a). It does not, however, provide for the suspension of the normal due process requirements.
25 Nor does it supplant a normal discovery process. Specifically, Rule 2004 requires that a party file
26 a motion requesting the bankruptcy court to order an examination. In this Court, Local Rule 2004-1
27 allows “*ex parte*” motions—but the Application gives no reason why the motion should be granted
28 without notice. Based on the foregoing, there are obvious disputes arising from the Insurers’

overbroad Application and RFPs—which are to be treated as a discovery disputes. Local Rule 2004-1(b). Under Local Civil Rule 37-1 and the Court’s dispute procedures, discovery disputes should be resolved by conferences among counsel.

Though the Local Rules may permit for a Rule 2004 application to be brought on an *ex parte* basis, *ex parte* relief remains an extraordinary remedy “both as a due process principle and as a procedural rule.” *Wright v. Beck*, 981 F.3d 719, 729 (9th Cir. 2020) (citing *Conservatorship of Moore*, 185 Cal. App. 3d 718, 725 (Cal. Ct. App. 1986) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action”) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *People v. Wilshire Ins. Co.*, 46 Cal. App. 3d 216, 222 (Cal. Ct. App. 1975) (“[I]n an adversary proceeding where an order may affect the rights of an adverse party, notice must be given to protect the adverse party’s right to be heard on the issue as a matter of due process of law.”))).

Ultimately the Insurers, “[i.e., t]he party seeking Rule 2004 discovery has the burden to show good cause for the examination it seeks.” *In re AOG Entertainment, Inc.*, 558 B.R. 98, 108-09 (Bankr. S.D.N.Y. 2016) (collecting cases). A movant “typically shows good cause by establishing that the proposed examination is necessary to establish the claim of the party seeking the examination, or . . . denial of such request would cause the examiner undue hardship or injustice.” *Id.* (internal quotation marks and citations omitted).

The Insurers have not established that good cause exists for this Court to order the requested relief on an *ex parte* basis, or that the Insurers will suffer any hardship if the Application is (1) set for hearing and (2) denied without prejudice or continued in favor of preliminary, informal discovery and a consensual process.

IV. RESERVATION OF RIGHTS

The Debtor reserves all rights with respect to any subpoena or other discovery request served in this Bankruptcy Case, including without limitation, the right to object on grounds of overbreadth, burden, and relevance, or to assert any applicable claim of privilege. Moreover, to the extent that the Insurers attempts to remedy their failure in the Application to articulate proper bases for the

1 relief requested, the Debtor reserves all rights to supplement this objection or to reply to any such
2 additional arguments.

3 **V. CONCLUSION**

4 For the reasons set forth herein, the Debtor respectfully requests that the Court deny the
5 Application and grant such other relief as the Court may deem just and appropriate.

6
7 Dated: April 8, 2024

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